

<sup>1</sup> ALJ Preliminary Decision (Nov. 26, 2003).

request that the Judge rescind the November 2003 order for an independent medical evaluation. Accordingly, respondent requests the Board to deny claimant's request for benefits.

Conversely, claimant asks the Board to affirm the Supplemental Preliminary Decision as respondent failed to comply with the appropriate procedure to request the Judge to reconsider a preliminary hearing issue. On page 2 of his brief to this Board, claimant writes, in part:

More specifically, the Respondent unilaterally refused to provide the medical treatment as ordered by Judge Foerschler. The Respondent failed to file an Application for Hearing so that the matter could be reset for a Preliminary Hearing for the Court to consider additional evidence. The Respondent chose to provide additional medical records to the Court that were not offered into evidence. As the result of this inappropriate procedure, the Court requested that the Claimant respond. Eventually, additional medical documents were obtained by the Claimant and forwarded to Administrative Law Judge Foerschler. Subsequent to this additional information, the supplemental Preliminary Hearing decision was issued as requested by the Respondent. Now the Respondent chooses to object that the proper procedures were not followed. That is correct. The Respondent did not follow the proper procedures in setting the matter before the Administrative Law Judge to reconsider a Preliminary Hearing issue.

The Respondent asked Judge Foerschler to change his mind without benefit of an Application for Hearing. The Respondent asked Judge Foerschler to change his mind without benefit of a Preliminary Hearing. The Respondent asked Judge Foerschler to review additional medical records of Dr. Tawil without a proper offer of evidence. The Respondent asked Judge Foerschler for a new decision. Now the Respondent objects to the very Supplemental Preliminary Decision that they requested and after getting what they wanted, i.e. a reconsideration of the facts and additional medical evidence of Dr. Tawil. Wherefore, the Plaintiff *[sic]* would pray for Order of this Court affirming the Supplemental Preliminary Hearing Decision of Dr. *[sic]* Robert Foerschler dated January 30, 2004.

The issue before the Board on this appeal is whether the January 30, 2004, Supplemental Preliminary Decision should be affirmed or set aside.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date, the Board finds and concludes:

In the interest of fairness to the parties, the Supplemental Preliminary Decision should be set aside as it was entered based upon letters and a medical report that claimant's counsel apparently did not share with respondent's counsel. Accordingly, this

matter should be remanded to the Judge for preliminary hearing proceedings in which the parties may offer their evidence and address the pertinent issues.

As indicated above, Judge Foerschler entered a November 2003 Preliminary Decision in which he requested an independent medical evaluation to address the issue of whether claimant's present groin problems resulted from his work for respondent. But, before that evaluation was attained, respondent's counsel wrote the Judge a December 9, 2003, letter in which respondent requested the Judge to rescind the order for the medical evaluation. Respondent's counsel also enclosed a copy of medical records that were not introduced at the earlier preliminary hearing. The December 9, 2003, letter indicates respondent's attorney sent a copy of the letter to claimant's attorney.

On December 10, 2003, Judge Foerschler wrote respondent's counsel, stating the Judge would wait for claimant's attorney's response before altering the Preliminary Decision. The Judge's letter indicates a copy of the letter was sent to claimant's counsel.

On January 15, 2004, respondent's counsel again wrote Judge Foerschler requesting the Judge to vacate the November 2003 Preliminary Decision, stating claimant had not objected to respondent's request to vacate the earlier order for an independent medical evaluation. The letter indicates a copy was sent to claimant's attorney.

However, on January 21, 2004, claimant's counsel wrote Judge Foerschler stating that respondent's counsel had not followed the proper procedure in seeking a change in the Preliminary Decision. The letter does not show a copy of it being sent to respondent's counsel.

Claimant's attorney again wrote Judge Foerschler on January 23, 2004, in which claimant's attorney enclosed a copy of a January 20, 2004, letter from Dr. Elias A. Tawil. The attorney's letter included argument that addressed the merits of claimant's request for medical benefits. Unfortunately, the claimant's attorney's letter does not indicate a copy being sent to respondent's counsel.<sup>2</sup>

After receiving the above correspondence, Judge Foerschler issued the January 30, 2004 Supplemental Preliminary Decision.

This claim demonstrates the problems and confusion that can occur when parties do not follow the appropriate procedures to schedule matters for hearing and orders are

---

<sup>2</sup> See page 2 of respondent's brief to the Board in which respondent states that claimant never responded to respondent's request to vacate the order for an independent medical evaluation and that the Judge inexplicably issued the January 30, 2004, Supplemental Preliminary Decision.

issued without the benefit of a record. Moreover, the record does not establish respondent's attorney was ever provided with copies of claimant's attorney's letters to the Judge or Dr. Tawil's January 2004 letter. Consequently, the Judge's January 2004 Supplemental Preliminary Decision was entered after inappropriate ex parte communication to the Judge.

Considering the circumstances surrounding the Supplemental Preliminary Decision, the Board concludes the Decision should be set aside and this matter remanded to the Judge for further proceedings. For future reference, claimant's counsel should provide opposing counsel with copies of all correspondence and documents that are forwarded to the Judge, as provided by the rules of professional conduct.<sup>3</sup>

**WHEREFORE**, the Board vacates the January 30, 2004, Supplemental Preliminary Decision and remands this matter to the Judge for further proceedings. Mr. Phalen is ordered to provide respondent's counsel with copies of all correspondence and documents that he has forwarded to the Judge in these claims. The Board does not retain jurisdiction over these claims.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of April 2004.

---

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Gary R. Terrill, Attorney for Respondent and its Insurance Carrier  
Robert H. Foerschler, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

---

<sup>3</sup> See Rule 3.5 of the Model Rules of Professional Conduct as adopted by the Kansas Supreme Court.